UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

GAETANO & ASSOCIATES INC., aka GAETANO, DIPLACIDI & ASSOCIATES INC.	
AND	**CASES**
	2-RC-22717
CONSTRUCTION AND GENERAL LABORERS LOCAL 79, LABORERS INTERNATIONAL UNION OF AMERICA, AFL-CIO	
GAETANO & ASSOCIATES INC., aka GAETANO, DIPLACIDI & ASSOCIATES INC.	
AND	**2-CA-35437**
	2-CA-35740
DISTRICT COUNCIL OF NEW YORK CITY AND VICINITY, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA	
AND	**2-CA-35555**
	2-CA-35619
CONSTRUCTION AND GENERAL LABORERS LOCAL 79, LABORERS INTERNATIONAL UNION OF AMERICA, AFL-CIO	
AND	**2-CA-35747**
WENDELL HENDERSON, an individual	

Margit Reiner Esq., Counsel for the General Counsel
Kevin J. Nash Esq., Counsel for the Respondent
Haluk Savci Esq., Counsel for the Mason Tenders District Council

DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case in New York City on February 26 and 27 and March 1 and 5, 2004.

On May 5, 2003, Laborers Local 79 filed a petition for an election in 2-RC-22717. Pursuant to a Stipulated Election Agreement approved on May 22, 2003, an election was conducted in the following unit:

> Included: All regular full-time laborers, including mason tenders, employed by the Employer out of its 2098 Fredrick Douglass Blvd. office and at various construction sites in the New York City Metropolitan area.
> Excluded: All other employees, office clerical employees, foremen, guards, professional employees and supervisors as defined in the Act.

The tally of ballots showed that of about 56 eligible voters, there were 5 cast for the Petitioner and 23 against.

On June 19, 2003, the Laborers' Union filed timely Objections to the Election. These alleged:

Objection 1: That the Employer failed to post copies of the Notice of Election at least 72 hours before the election.

Objection 2: That the Employer engaged in surveillance of employees' union activities, interrogated employees and required employees to sign statements attesting to any past union membership or affiliation.

Objection 3: That the Employer used a guard as an observer at the election.

Objection 4: That the Employer reduced the pay of union supporters. [1]

Objection 5: That the Employer threatened employees with discipline if they supported the Union.

Objection 6: That certain supervisors actively campaigned against the Union on the day of the election and within yards of the polling area.

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[1] There is no charge and no allegation in the Complaints alleging that the Employer reduced the pay of union supporters. Although testimony to this effect was given by Sean Logan, I don't think that Objections, which essentially raise an allegation that otherwise would be a violation of Section 8(a)(3) of the Act, can be successful if there is no corresponding unfair labor practice allegation. *Times Square Stores Corp.*, 79 NLRB 361 (1948). See also *Texas Meat Packers*, 130 NLRB 279 (1961), *Cooper Supply Co.*, 120 NLRB 1023 (1958), and *Capitol Records*, 118 NLRB 598 (1957).

On October 10, 2003, the Acting Regional Director concluded that the Laborers' Objections raised substantial and material factual issues that would best be resolved by a hearing. He therefore ordered that the Objections be consolidated with the unfair labor practice complaint described below.

The charge, amended charge and second amended charge in 2-CA-35437 were filed by the Carpenters union on April 17, May 27 and July 16 2003. The charge in 2-CA-35583 was filed by Greenidge on June 19, 2003. The charge and amended charge in 2-CA-35555 were filed by the Laborers Union on June 4 and August 28, 2003. The charge in 2-CA-35619 was filed by the Laborers on July 7, 2003. The charge in 2-CA-35740 was filed by the Carpenters on August 28, 2003. And the charge in 2-CA-35747 was filed by Wendell Henderson September 5, 2003.

At the opening of the hearing, the General Counsel withdrew the allegations of the Complaint relating to Greenidge and withdrew the charge filed by him in 2-CA-35583.

As amended, the Consolidated Complaint that was issued on October 31, 2003 alleged

1. That on June 9, 2003, the Carpenters' Union was certified as the exclusive collective bargaining agent for the Respondent's employees in a unit of

> All regular full-time carpenters, including lead carpenters, employed by the Employer out of its 2098 Fredrick Douglass Blvd. office and at various construction sites in the New York City Metropolitan area, excluding all other employees, office clerical employees, and guards, professional employees, foremen and supervisors as defined in the Act.

2. That on April 16, 2003, the Respondent laid off the following employees because they assisted and supported the Carpenters' Union at a hearing before the Board in 2-RC-22710 and attended the hearing for the purpose of providing testimony. [2]

Tony Auguste	Nicholas Blake
Drabio Dollin	Hainson George
Marcus Williams	Lavistor Joseph
Marvin Gullen	Vitals Mathorin
John Nash	Anderson Pilgrim
Stonde Richardson	Michael Sargeant
Ali Sillah	

3. That on or about April 21, 2003, the Respondent by Matthew Gaetano, an owner, required employees to sign a document denying that they were union member and threatened employees with unspecified reprisals if they refused to do so.

4. That on or about May 5, 2003, the Respondent by Matthew Gaetano, threatened

[2] In her brief, the General Counsel withdrew from this list of alleged discriminates, the name Don Joseph.

employees with discharge if they continued to support a union and implied that a strike was inevitable if they selected a union.

5. That on May 13 and 15, 2003, the Respondent by Joseph Superville, a supervisor, told employees that they would not be recalled because they joined or assisted the Carpenters' Union and because they assisted that union in 2-RC-22710.

6. That in the last week of May 2003, the Respondent by Matthew Gaetano, threatened employees with discipline and discharge if they selected a union.

7. That on May 29, 2003, the Respondent by Joseph Superville, told employees that they had to choose between supporting the Union and continuing to work for the Respondent.

8. That in May 2003, the Respondent, for discriminatory reasons, subcontracted window installation and other work, all of which had previously been done by employees in the carpenters' unit.

9. That on June 10, 2003, the Respondent, for discriminatory reasons, unilaterally and without notice to the Carpenters' union, subcontracted sheet rock and other work to T. Walker Construction Inc.

10. That on June 12, 2003, the Respondent, by Joseph Superville, threatened employees with unspecified reprisals if they voted for the Laborers' Union and created the impression of surveillance.

11. That on June 13, 2003, the Respondent by Joel Little, a foreman and supervisor, coerced employees by writing antiunion messages on their garments and hard hats.

12. That on July 2, 2003, the Respondent by Stephen Gaetano, an owner, reprimanded employees for supporting a union and interrogated employees about their union activities.

13. That on July 2, 2003, the Respondent by Joseph Superville, interrogated employees about their activities for the Laborers' Union.

14. That on July 2, 2003, the Respondent, for discriminatory reasons discharged Davidson Plenty and Benedict Plentie.

15. That on July 3, 2003, the Respondent, for discriminatory reasons discharged Paul Valle.

16. That on August 27, 2003, the Respondent, for discriminatory reasons discharged Wendell Henderson.

17. That since August 27, 2003, the Respondent has refused to bargain with the Carpenters' Union.

The Respondent asserts that between April 18 and May 3, 2003, it laid off seven employees for business reasons; namely that the individuals were "rough" carpenters whose

work had been completed at the project. The Respondent further asserts that it subcontracted the window installation work as it normally does because of the specialized nature of this work and that it had made this decision more than a year prior to the start of the project. The Respondent asserts that Davidson Plenty and Benedict Plentie were discharged for cause and that it was aware that they were union members when it hired them. Finally, the Respondent asserts that Paul Valle was terminated after being warned about poor work performance and that Wendell Henderson was discharged for misconduct.

Based on the evidence as a whole, including my observation of the demeanor of the witnesses and after consideration of the Briefs filed, I hereby make the following findings and conclusions.

Findings and Conclusions

I. Jurisdiction

In both Stipulated Election Agreements executed by the Respondent through its legal counsel, it agreed that it purchased goods and supplies valued in excess of $50,000 for its New York job sites from firms located within the State of New York, and that such goods originated directly from suppliers located outside the State of New York. Accordingly, as the Employer at the time of the events in these cases, was engaged in interstate commerce and met the Board's indirect inflow standards, I conclude that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. *Siemons Mailing Service*, 122 NLRB 81 (1959); *Food & Commercial Workers Local 120 (Weber Meats)*, 275 NLRB 1376 fn. 1 (1985); *Combined Century Theatres*, 120 NLRB 1379 (1959); 146 NLRB 459 (1964); *Better Electric Co*., 129 NLRB 1012 (1961).

At the hearing, the Respondent also conceded and I conclude that the two unions are labor organizations within the meaning of Section 2(5) of the Act.

II Alleged Unfair Labor Practices

(a) Background

At the hearing the Respondent stipulated that Stephen Gaetano and Mathew Gaetano, (the owners), Patrick Lewis, William McGuigan, and Joseph (Sammy) Superville were supervisors and/or agents within the meaning of Section 2(11) or (13) of the Act. In this respect, the Employer asserts that William McGuigan was the job supervisor until his discharge in or about mid April 2003 and that Superville, who until that time was a carpenter, took over that position. The Employer denies, however, that Joel Little or Donovan Lewis were supervisors and asserts that they were merely masons.

The Company is the owner and developer of properties in New York City. Before 1998, it utilized contractors within the various building and construction trades to complete projects. But in or around 1998, it decided to become its own General Contractor and to perform as much of the construction work as was possible. It decided to do this because its management believed that this would be a more efficient way of doing construction and would avoid legal and other problems with subcontractors. Whether this was a good or poor decision remains to be seen. It

is not, however, within my purview.

The primary construction site involved in this case involves the renovation of three attached apartment buildings located in Manhattan between 113 and 114th Street on Frederick Douglas Blvd. This involves gutting existing structures while retaining the outside walls and rebuilding them completely. Ultimately, the intent is to sell the apartments as condominiums. The vast majority of the labor that was assigned, was allocated to this project, which began in or about November 2002. For purposes of this decision I shall refer to it as site 1.

As part of the deal by which the Respondent purchased the properties, it also agreed to rebuild a two family brownstone located a short distance away, which after completion, would be turned over, at no cost, to the original owners of the properties. During the months of April, May and June 2003, this site was manned by a much smaller crew. For purposes of this Decision I shall refer to this as site 2.

As noted above, work at site 1 began in November 2002. The first part of the work essentially involved demolition. And to this end, the Company hired a group of people who basically reduced the inside of the buildings to a shell. This work, apart from muscle power, did not involve much skill, and was mostly accomplished by January or February 2003 at which time the Respondent began hiring carpenters, masons and laborers. Insofar as the carpentry work, the initial stages after demolition, involved putting in beams, studs and the framing for the floors and walls of the buildings. This, I believe, involves creating the internal framework for the structures within which the floors, walls, windows, and ceilings would be placed. During this stage of the work, the evidence shows that there were about 25 carpenters employed under the direction of Patrick Lewis, William McGuigan and later Joseph (Sammy) Superville.

The Company asserts that this initial stage of carpentry is considered to be "rough" carpentry and that many of the employees who were hired to do this initial phase were hired only as temporary workers whose jobs would end at the completion of this phase of work. It therefore asserts that when this "rough" carpentry work was completed as of April 16, 2003, a fair number of these employees were no longer needed and that the next stage of carpentry work required people with higher skills to do "finish" carpentry. Virtually all of the General Counsel witnesses who were employed as carpenters and who had prior experience in this field, testified that the next stage of carpentry work would also be considered as "rough" carpentry and that they were perfectly competent to do such work. We will come back to this.

Hopefully for purposes of organizational clarity, I am going to divide this decision into two major sections; one dealing with the carpenters' unit and the other with the laborers' unit. However, it should be noted that both groups of people worked side by side at the Company's job sites and that many of the events overlapped in time. Thus, events and actions described in the carpenter's section, necessarily impacted on the laborers and vice versa.

(b) The Carpenters

(1) The 8(a)(1) and (3) allegations
2-CA-35437 and 2-CA-35437

Representatives of the Carpenters' Union began organizing efforts at the primary site in

early April 2003. Organizer, Bryan Schuler, talked to people outside the site on the sidewalk or at a delicatessen located across the street where employees and supervisors normally went to get food or drinks at their breaks. At some point shortly thereafter, he invited representatives of the Laborers' Union to accompany him to the job site to sign up masons and laborers. As this union activity was carried out in the open and as Sammy Superville was among the people solicited by the Carpenters' representative, it is likely that the Company was aware of the union organizing activity even before a petition for an election was filed by either union.

Byron Schuler called the Company on April 16, 2003 and speaking to William Gaetano, represented that his union represented the carpenters. This was followed up by a letter dated April 16 advising that the Union claimed to represent a majority of the carpenters employed by the Company.

Also on April 16, 2003, the Carpenters' Union filed a petition for an election. The NLRB's Regional Office immediately faxed a copy of this petition along with a Notice that a Representation Hearing would take place on April 25, 2003. *The transmission was started at 12:41 p.m. and completed on April 16, 2003 at 12:46 p.m.*

At the end of the working day on April 16, 2003, the Respondent, at a meeting at site 1, read a list to the carpenters. They were told that if their names were called, they would continue to work, but if their names were not called, they were being laid off. Reviewing the testimony of witnesses and payroll records, the evidence shows that the people who were laid off on this date were Tony Auguste, Nicholas Blake, Dabio Dottin, Hainson George, Lavister Joseph, Marvin Julien, Vitalis Mathurin, John Nash, Anderson Pilgrim, Michael Sargeant, Ali Sillah, and Marcus Williams. Of this group, Dabio Dottin, Hainson George, Marvin Julien and Michael Sargeant were later recalled to work in May or June 2003.

On April 16, 2003, the Respondent hired Roger Superville and Leonard Alexander to work as carpenters at site 1. A week later, it hired McKenneth Fleming to work as a carpenter at site 1. And soon thereafter, the Respondent hired three more carpenters to work at site 1. (Donnell Vialet, Trevor Haynes and Stephen Samuel). In addition, the evidence shows that after the April 16 layoff, the Company entered into subcontracts with a company called STD to install windows and another company, T. Walker to install sheetrock. Except for the window casements, the evidence convinces me that the installation of the windows was, with appropriate supervision, within the capability of the "rough" carpenters who had been laid off. Similarly, with respect to the sheet rock work, the evidence convinces me that except for taping, the installation of sheet rock was, with appropriate supervision, work that could and would have been done by the "rough" carpenters.

In short, given **(1)** the timing of the layoffs, (immediately after the union demanded recognition and after receipt of the election petition); **(2)** the fact that the Company hired more carpenters, (either directly or through subcontractors), to replace those laid off, and **(3)** the inaccurate assertion that the existing carpenters could not do most of the remaining work, its is my opinion that the evidence establishes that the layoffs/discharges of April 16 were motivated by anti-union considerations. Moreover, I do not think that the Company has established that it would have laid off or discharged these people, notwithstanding the activity of the Union to organize them. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982)

As noted above, the Company executed a Stipulated Election agreement on April 30, 2003, and the election in the carpenter unit was scheduled for May 30, 2003.

There was testimony regarding a meeting held by Mathew Gaetano with employees before the election. Sean Logan, a mason, testified that after explaining why Superville was replacing McGuigan, Gaetano said something to the effect that he couldn't keep people who were affiliated with a union. In a similar vein, Paul Valle, a bricklayer, testified that Mathew told employees that if they voted for the union he couldn't use them, but if they voted no, they would have a job. Both stated that Gaetano had something for the employees to sign.

According to Mathew Gaetano, after receiving the phone call from union agent Schuler on April 16, 2003, he called his general attorney and prepared a form that was left for employees to sign if they so chose. This document, which is Respondent's Exhibit 2, is in the form of a petition that was signed by many of the employees after being asked to do so by Patrick Lewis. The heading states: "By signing this petition you are acknowledging that you are an employee of Gaetano and Associates, Inc. and are not a member of the Union."

Where an employer solicits employees to sign a document such as the one described above, this constitutes coercive interrogation because if tends to force employees to declare whether or not they are sympathetic to a union. *Beverly California Corp*., 326 NLRB 232, 233-34 (1998) enf. den., on other grounds, 277 F.3d 817 (7th Cir. 2000). See also *Kurz-Kasch Inc*., 239 NLRB 1044 (1978), where the Board held that an employer's request that employees wear a "vote no" button constituted coercive interrogation. Accordingly, I conclude that in this respect, the Respondent violated Section 8(a)(1) of the Act.

Employee Sean Logan testified that in mid-May 2003, as he was entering the deli, Superville and another employee passed by whereupon Superville said, "be careful talking to him." (Referring to union agent Anthony Williamson). According to Logan, the other employee told him that he could lose his job for talking to Williamson. Since this statement was made by an employee and not by anyone from management, I conclude that this did not violate the Act.

Employee Blake testified that on May 29, 2003, he went to the job site and asked Superville for his job back. He testified that Superville said that he couldn't do anything until they saw how the election went and that he couldn't get his job back because he went against the boss. I conclude that this constituted a threat within the meaning of Section 8(a)(1) of the Act. [3]

On July 2, 2003, the Respondent discharged Benedict Plentie and his brother Davidson Plenty. [4]

At one time, Benedict Plentie was the owner of his own firm called B.P. Construction, which was a small enterprise engaged in carpentry work. He is a carpenter who is qualified to do

[3] A recording of this alleged conversation that was made by Blake and was offered into evidence. However, as the recording was largely inaudible, I am not relying on it.

[4] They spell their last names differently.

"finish" work. He also was a journeyman-member of the Carpenters' union and this was known to Gaetano when, in the previous five years, he contracted carpentry work with B.P.

In February or March 2003, the Company hired the two brothers as direct employees to work as carpenters at the brownstone project. (Site 2). They were left there to work without supervision and were responsible for doing all of the carpentry work for that location. At times they were assisted by one or two laborers. The fact that Mathew Gaetano hired them with the knowledge that at least Benedict was a union member is not particularly significant. Since he took a job which was non-union, Gaetano could reasonably have surmised that Plentie's attachment to the Carpenter's union was not particularly strong.

In any event, on July 2, 2003, (shortly after the Union made a demand to bargain), Steven Gaetano visited site 2 and saw Benedict and Davidson wearing union t-shirts. When Benedict responded that he had gotten the shirt from the union agent, Gaetano asked if he knew the problems they were having with the Union. When he saw that Davidson was wearing a union t-shirt, Gaetano angrily said, "you probably orchestrated the whole thing." (Steven Gaetano did not testify and therefore, the testimony regarding his conversations with the two brothers was uncontradicted).

The two brothers credibly testified that on the same day, they received a visit from Superville who told them that Mathew Gaetano was closing the job site down because he was having a problem with the bank. Davidson testified that after he and his brother picked up their tools, Superville told him that it was not right that they were fired for wearing t-shirts after they had worked for Mathew Gaetano for such a long period of time.

The brothers were never asked to return to work and were never transferred to the other job site where the evidence shows that the Company continued to either hire new carpenters or hire subcontractors to do the installation of windows and sheetrock. Thus, even if there was some problem with financing, and even if it was not possible for the Company to continue to carry on work at site 2, there is no question but that carpentry work continued on site 1 and that Benedict and Davidson were qualified to do the carpentry work at that location. I also note that it was not uncommon for the Company to shift workers from site to site as needed. I also reject the Company's assertion that these two people were lax in their work performance or that they failed to do the work assigned to them. (Respondent admits that it never issued any warnings to them). In this respect, I credit the testimony of the two carpenters.

Accordingly, I conclude that the Respondent violated Section 8(a)(1) and (3) by discharging the Plentie, (Plenty), brothers.

(2) The Refusal to Bargain
2-CA-35740

Notwithstanding the layoffs and the other conduct described above, the Carpenters' union won the election that was held on May 30, 2003. The Union was certified on June 9, 2003.

On June 30, 2003, Ed McWilliams wrote to the Respondent requesting that negotiations begin on July 10. This letter also requested the names, dates of hire, job titles and current rates of pay for the bargaining unit employees. When the Union received no response, McWilliams

sent out another letter on July 23, asking for a meeting on August 5. He repeated his request for the information.

The parties met on August 5 and after tendering a copy of the standard agreement, the Company's lawyer essentially said he would have to review it. The parties agreed to a meeting on August 27 and the Respondent promised to tender the requested information by August 12, 2003.

The Respondent did not proffer the requested information and did not show up for, or call to reschedule the August 27 meeting. As a result, McWilliams sent another letter dated September 2 asking to bargain. This was followed up by a letter dated September 22 asking that a meeting be scheduled. No response was received.

Having been certified by the Board on June 9, 2003, the Respondent was obligated, under Section 8(d) of the Act, to meet at reasonable times and places and to bargain in good faith with the Carpenters' union during the Certification year. It clearly did not do so, and except for one short meeting in August 2003, the Respondent essentially ignored the Union's repeated requests for negotiations. Any statement during this hearing that the Respondent is now willing to bargain, is too late and insufficient to mitigate against a finding that the Respondent failed to engage in bargaining in a timely and responsive manner.

Moreover, I reject any assertion that the Union either bargained in bad faith or that a valid impasse was reached. In this regard, the Respondent claimed that at the only meeting held on August 5, 2003, the Union's representatives took a "take it or leave it" stance when presenting a contract proposal. This contention, in my opinion, is absurd. I credit the Union's representative who testified that the contract tendered was a proposal and that he invited the Respondent to review it and make counterproposals of its own. The Respondent did not do so and instead simply refused to respond to the Union's requests for further negotiations. In this respect, I conclude that the Respondent violated Section 8(a)(1) & (5) of the Act.

By the same token, the evidence shows that the Respondent failed to respond to the Union's request for information concerning the employees' names, dates of hire, job titles and current rates of pay. All of this information is presumptively relevant to collective bargaining and the Respondent's refusal to furnish this information constitutes a violation of Section 8(a)(1) & (5) of the Act. *NLRB v Truitt Mfg. Co*., 351 U.S. 149 (1956); *NLRB v Boston Herald-Traveler Corp*., 209 NLRB F.2d 134 (1st Cir. 1954); *Gloversville Embossing*, 314 NLRB 1258 (1994). *Toms Ford Inc*., 253 NLRB 888, 895 (1990); *Georgetown Associates d/b/a Georgetown Holiday Inn*, 235 NLRB 485, 486 (1978).

The evidence shows that the Respondent, on or about June 10, entered into a subcontract with T. Walker to perform insulation, sheetrock, spackle and taping work at site 1. All of these functions are those that are normally performed by carpenters. (Taping is a function that everyone agrees is "finished" carpentry).

Inasmuch as the Carpenters' Union had just been certified, and as the Respondent has not shown that the decision to subcontract this work was not one based on "core entrepreneurial concerns," the Respondent was therefore obligated to first notify and offer to bargain with the Union before making any unilateral changes in the terms and conditions of employment for the

employees covered by the Certification. Since subcontracting affected the tenure or job opportunities of unit employees, particularly those who had been laid off and could have been recalled, it is my opinion that this decision to unilaterally subcontract bargaining unit work was a violation of Section 8(a)(1) & (5) of the Act. *Fiberboard Corp. v. NLRB*, 379 U.S. 203 (1964); *Overnite Transportation Company*. 330 NLRB 1275 (2000).

The General Counsel also alleges that this subcontracting decision separately violated Section 8(a)(3) of the Act. Inasmuch as I have previously concluded that certain carpenters were discriminatorily laid off or discharged, and as I have relied, at least to some extent on this subcontracting, as undermining any contention that there was insufficient work for the laid-off carpenters, any separate finding that the subcontracting, by itself, violated 8(a)(3), would be superfluous.

(c) The Laborers

(1) The Election 2-RC-22717

Laborers Local 79 started organizing employees sometime later than the Carpenters' Union. As noted above, Local 79 filed its petition for an election on May 5, 2003. Pursuant to the petition and a Stipulated Election Agreement approved on May 22, 2003, an election was held on June 13, 2003. The Union lost.

On June 19, 2003, Local 79 filed timely Objections to the Election. The allegations thereof are listed at the beginning of this Decision.

The uncontested evidence showed that the Employer failed to post the required Election Notice to Employees. Pursuant to Section 103.20 of the Board's Rules and Regulations, the notice must be (1) posted for 3 full working days in advance of the election; (2) a party responsible for misposting is estopped from objecting to the non-posting; (3) an employer is conclusively deemed to have received the notices unless it notifies the Regional Office at least 5 full working days before the election of its non-receipt; and (4) failure to post the notices as required is ground for a new election when objections are filed. *Sugar Food*, 298 NLRB 628 (1990), for a discussion of the rule and the policy with respect to defaced notices. The Board has held that the rule is strictly enforced. *Smith's Food & Drug*, 295 NLRB 983 (1989). [5]

Inasmuch as I have concluded that Objection 1 has merit, it is unnecessary for me to make findings or conclusions with respect to the other objections, as this is enough to overturn the election. Accordingly, I recommend that the election in 2-RC-22717 be set aside and that this portion of the case be remanded to the Regional Director in order to conduct a new election.

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[5] In *Madison Industries*, 311 NLRB 865 (1993), the Board did not set aside an election where an amended notice was posted for a portion of the time. The Board found that the change (eligibility) did not affect the notice to employees that is the purpose of the Rule. In another case, an election was not set aside in an election involving two unions where the circumstances could "invite collusion" by any employer who might favor one of the competing unions. The employer's failure to post the Notice in such circumstances would provide an unsuccessful favored union with a basis to set aside the election. *Maple View Manor*, Inc., 319 NLRB 85 (1995).

(2) Alleged 8(a)(1) & (3) violations
2-CA-35555, 2-CA-35619,
2-CA-35619, 2-CA-35747

The evidence shows that after the Carpenters' union won their election, Mathew Gaetano held a meeting with the employees eligible to vote in the Laborers' election. Mathew Gaetano asserts that he merely told employees that after spending thousands of dollars in the prior election, the employees should do whatever they wanted. However, the credible evidence convinces me Gaetano also told employees that the carpenters had betrayed him by voting for that union and that although he could not give raises now, if the laborers voted against the Union, "things would look different" or that "there would be a possibility to make changes." This, in my opinion, is an implied promise of benefit designed to induce the employees to vote against unionization. Therefore, I conclude that in this respect, the Employer violated Section 8(a)(1) of the Act. *Superior Emerald Park Landfill, LLC*, 340 NLRB No. 54, slip opinion at pages 11-12, (2003).

Employee Logan testified that on June 12, 2003, (the day before the election), Sammy Superville told him that if he voted no, "I'll know." Wendell Henderson testified that on that same day, foreman, Donovan told him that if he didn't stop talking about the union, he (Donovan) would have Henderson removed from the job even if he had to use force. In addition, employees Logan and Valle testified that shortly before the Laborer's election, the mason foreman Joe Little wrote on the men's hardhats, "No Union."

Since I credit the testimony of the employees describing the above events, I conclude that the Respondent thereby violated Section 8(a)(1) of the Act. In the case of Superville, I conclude that his remarks to Logan on June 12 conveyed the impression of surveillance. *Feldkamp Enterprises*, 323 NLRB 1193, 1198 (1997); *Sarah Neuman Nursing Home*, 270 NLRB 663, fn 4, (1984). In the case of Donovan, I conclude that his remarks to Henderson, constitute threats of reprisal. And in the case of Little's notation on the men's hard hats, I conclude that this was the equivalent of illegal interrogation. *Fieldcrest Cannon*, 318 NLRB 470 (1995), enf'd in relevant part, 97 F.3d 65 (4th Cir. 1996).

Paul Valle, who was employed as a laborer and who acted as the Union's observer in the Laborers' election, was discharged on July 3, 2003, shortly after the firing of the Plenty brothers. He credibly testified that Superville stated that he was being let go because "he was down with the union."

The Respondent claims that Valle worked slowly and had a record of poor work performance. This was credibly denied by Valle. In this regard, the Respondent could produce no written warnings relating to Valle and the Company's policy manual contains a progressive disciplinary system.

Based on all of the other violations, thereby showing that the Company had a predisposition to retaliate against employees for their union activities, it is my conclusion that the General Counsel has met her burden under *Wright Line*, supra and that the Respondent has failed to meet its burden. Therefore, I conclude that by discharging Valle, the Respondent violated Section 8(a)(1) & (3) of the Act.

With respect to Wendell Henderson, he was accused on August 25 of sexual harassment and was given a written warning to that effect that he refused to sign. He was thereafter discharged on August 26, 2003.

There is evidence that Henderson got mad and yelled at Summerville when the accusation was made. But Henderson credibly denied that that he engaged in the alleged sexual harassment or that cursed at Summerville.

The Company also asserts that on August 27, 2003, (after his discharge), Henderson made a threat to kill Mathew Gaetano if he didn't get his paycheck.

I credit Henderson's denials of the accusations made against him and I note that the Employer did not produce any evidence that he actually engaged in the alleged harassment.

For the same reasons given in Valle's case, I conclude that the Respondent, by discharging Henderson, violated Section 8(a)(1) & (5) of the Act.

Conclusions of Law

1. By soliciting employees to sign a petition indicating they were not members of a union and by requiring them to wear vote no signs on their hardhats, the Respondent has illegally interrogated employees about their union activities in violation of Section 8(a)(1) of the Act.

2. By threatening employees with job loss, the Respondent has threatened employees in retaliation for their union activities and has violated Section 8(a)(1) of the Act.

3. By promising benefits to employees if they voted against unionization, the Respondent has violated Section 8(a)(1) of the Act.

4. By giving employees the impression of surveillance, the Respondent has violated Section 8(a)(1) of the Act.

5. By threatening to physically remove employees from the job site because of their union activities, the Respondent has violated Section 8(a)(1) of the Act.

6. By laying off or discharging employees because of their union activities or in retaliation for the efforts of the Unions to organize them, the Respondent has violated Section 8(a)(1) & (3) of the Act.

7. By failing and refusing to meet and bargain collectively with District Council of New York City and vicinity, United Brotherhood of Carpenters and Joiners of America, the Respondent has violated Section 8(a)(1) & (5) of the Act.

8. By failing to furnish relevant information to the Union such as the names, job titles, dates of hire and rates of pay, the Respondent has violated Section 8(a)(1) & (5) of the Act.

9. By unilaterally subcontracting carpentry work without first notifying or bargaining with the Carpenters' Union, the Respondent has violated Section 8(a)(1) & (5) of the Act.

10. By failing to post the Election Notices in Case No. 2-RC-22717, the Respondent has interfered with the conduct of the election and it should therefore be set aside so that a new election can be conducted.

11. The aforesaid acts of the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Tony Auguste, Nicholas Blake, Drabio Dollin, Hainson George, Marcus Williams, Lavistor Joseph, Marvin Gullen, Vitals Mathorin, John Nash, Anderson Pilgrim, Stonde Richardson, Michael Sargeant, Ali Sillah, Davidson Plenty, Benedict Plentie, Paul Valle and Wendell Henderson, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of their discharge to the date of their reinstatement or a valid reinstatement offer, less any net interim earnings, as prescribed in *F.W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Florida Steel Corp*., 231 NLRB 651 (1977). [6]

In addition to ordering the Respondent to bargain with the Carpenters' Union and to furnish it with relevant information upon request, I also shall recommend that the Certification year be extended so that the bargaining unit employees will be accorded the services of their collective bargaining representative for the full period provided by law. I therefore recommend that the initial period of certification as beginning on the date the Respondent commences to bargain in good faith with the Union. See *Mar-Jac Poultry Company, Inc.,* 136 NLRB 785.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended: [7]

[6] Backpay for Dabio Dottin, Hainson George, Marvin Julien and Michael Sargeant would terminate on the dates that they were recalled to employment. These individuals were recalled in May or June 2003.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Gaetano & Associates Inc., aka Gaetano, Diplacidi & Associates Inc., its officers, agents, successor, and assigns, shall

1. Cease and Desist from

(a) Soliciting employees to sign a petition indicating they are not members of a union or requiring them to wear vote no signs on their hardhats or work clothes.

(b) Interrogating employees about their membership in or activities on behalf of a labor organization.

(c) Threatening employees with job loss in retaliation for their union activities.

(d) Promising benefits to employees if they vote against unionization.

(e) Giving employees the impression that their union activities are under surveillance.

(f) Threatening to physically remove employees from the job site because of their union activities.

(g) Laying off or discharging employees because of their union activities or in retaliation for the efforts of Unions to organize them.

(h) Failing and refusing to meet and bargain collectively with District Council of New York City and vicinity, United Brotherhood of Carpenters and Joiners of America.

(i) Failing to furnish relevant information to the Carpenters' Union such as the names, job titles, dates of hire and rates of pay.

(j) Unilaterally subcontracting carpentry work without first notifying or bargaining with the Carpenters' Union.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) To the extant that it has not already done so, within 14 days from the date of this Order, offer Tony Auguste, Nicholas Blake, Drabio Dollin, Hainson George, Marcus Williams, Lavistor Joseph, Marvin Gullen, Vitals Mathorin, John Nash, Anderson Pilgrim, Stonde Richardson, Michael Sargeant, Ali Sillah, Davidson Plenty, Benedict Plentie, Paul Valle and Wendell Henderson,, full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the Remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful actions against the above named employees and within 3 days thereafter, notify them in

writing, that this has been done and that the discharges will not be used against them in any way.

(c) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement. The appropriate bargaining unit is as follows:

> All regular full-time carpenters, including lead carpenters, employed by the Employer out of its 2098 Fredrick Douglass Blvd. off at various construction sites in the New York City Metropolitan area, excluding all other employees, office clerical employees, and guards, professional employees, foremen and supervisors as defined in the Act.

(d) Upon request of the Union, furnish the names, addresses and dates of hire of all employees who are in the carpenter's appropriate collective bargaining unit.

(e) Upon request, bargain with the Union about the subcontracting of carpentry work.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facilities in New York, copies of the attached notice marked "Appendix." 8 Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition, since the evidence shows that the employees do not often go to the Company's home facility, but rather are dispersed at various locations in New York City, the Respondent shall mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since April 16, 2003.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that

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[8] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

the Respondent has taken to comply.

(i) Case number 2-RC-22717 should be remanded to the Regional Director for the purpose of conducting a new election.

Dated, Washington, D.C.

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Raymond P. Green
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT solicit employees to sign a petition indicating they are not members of a union or require them to wear vote no signs on their hardhats or work clothes.

WE WILL NOT interrogate our employees about their membership in or activities on behalf of a labor organization.

WE WILL NOT threaten our employees with job loss in retaliation for their union activities.

WE WILL NOT promise benefits to our employees if they vote against unionization.

WE WILL NOT give our employees the impression that their union activities are under surveillance.

WE WILL NOT threaten to physically remove employees from job sites because of their union activities.

WE WILL NOT layoff or discharge our employees because of their union activities or in retaliation for the efforts of Unions to organize them.

WE WILL NOT refuse to meet and bargain collectively with District Council of New York City and vicinity, United Brotherhood of Carpenters and Joiners of America.

WE WILL NOT fail to furnish relevant information to the Carpenters' Union such as the names, job titles, dates of hire and rates of pay of our employees who are within the certified bargaining unit.

WE WILL NOT unilaterally subcontract carpentry work without first notifying or offering to bargain with the Carpenters' Union.

WE WILL to the extant that we have not already done so, offer Tony Auguste, Nicholas Blake, Drabio Dollin, Hainson George, Marcus Williams, Lavistor Joseph, Marvin Gullen, Vitals Mathorin, John Nash, Anderson Pilgrim, Stonde Richardson, Michael Sargeant, Ali Sillah, Davidson Plenty, Benedict Plentie, Paul Valle and Wendell Henderson,, full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL remove from our files any reference to the unlawful actions against the above named employees and within 3 days thereafter, notify them in writing, that this has been done and that the discharges will not be used against them in any way.

WE WILL on request, bargain with the Union as the exclusive representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the

understanding in a signed agreement. The appropriate bargaining unit is as follows:

> All regular full-time carpenters, including lead carpenters, employed by the Employer out of its 2098 Fredrick Douglass Blvd. off at various construction sites in the New York City Metropolitan area, excluding all other employees, office clerical employees, and guards, professional employees, foremen and supervisors as defined in the Act.

WE WILL upon request of the Union, furnish the names, addresses and dates of hire of our employees who are in the Carpenter's appropriate collective bargaining unit.

WE WILL upon request, bargain with the Union about the subcontracting of carpentry work.

Gaetano & Associates Inc., aka Gaetano, Diplacidi & Associates Inc.

(Employer)

Dated _____ **By** _____

(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.
26 Federal Plaza, NY 10278–0104, Telephone 212–264–0346. Hours: 9 a.m. to 5:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

> THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER 212-264-0346.